
An Introduction to Federal Guideline Sentencing

Seventh Edition

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Table of Contents

The Basic Statutory System 1

Imposition of Guideline Sentence; Departure 2

Guidelines and Statutory Minimums 2

Drug cases 2

Firearms cases 2

Sentencing Below a Statutory Minimum 2

Cooperation 3

Safety valve 3

No Parole; Restricted Good-Time Credit 3

Probation and Supervised Release 3

Probation 3

Supervised release 3

Conditions and revocation 3

Fines and Restitution 4

Review of a Sentence 4

Sentence Correction and Reduction 4

Petty Offenses; Juveniles 4

Statutory Amendments 5

The Guidelines Manual 5

Chapter One: Introduction and General Application Principles 5

Relevant conduct 5

Guidelines, policy statements, and commentary 5

Chapter Two: Offense Conduct 6

Drug offenses 6

Economic offenses 7

Chapter Three: Adjustments 7

Role in the offense 7

Obstruction 7

Multiple counts 7

Acceptance of responsibility 8

Chapter Four: Criminal History and Criminal Livelihood 8

Criminal history departure 8

Repeat offenders 8

Career offender 8

Armed career criminal 8

Repeat child-sex offender 9

Chapter Five: Determining the Sentence; Departures 9

Chapter Six: Sentencing Procedures and Plea Agreements 10

Chapter Seven: Violations of Probation and Supervised Release 10

Chapter Eight: Sentencing of Organizations 11

Appendices 11

Applying the Guidelines 11

Step-by-Step Application 11

Sentencing Hearing 12

Plea Bargaining Under the Guidelines 12

Charge Bargaining 12

Relevant conduct 12

Multiple-count grouping 13

Sentencing Recommendation; Specific Sentencing Agreement 13

Acceptance of Responsibility 13

Cooperation 14

Some Traps for the Unwary 14

Pretrial Services Interview 14

Waiver of Sentencing Appeal 15

Presentence Investigation Report and Probation Officer's Interview 15

Guideline Amendments 16

Validity of Guidelines 17

Telephone Support and Online Information 17

Bibliography 17

About This Publication 18

Appendices

Sentencing Worksheets

Sentencing Table

An Introduction to Federal Guideline Sentencing

For lawyers accustomed to discretionary sentencing practice, the federal sentencing guidelines present an alien and dangerous terrain. Because of their complexity, the sentencing guidelines can be a minefield for the defense, increasing exponentially the effort required to provide effective representation. To succeed in this environment, defense counsel must become fully involved in a case at the earliest possible time. In all defense efforts—from seeking pretrial release, to investigation, to discovery, to plea negotiations, to the trial itself—counsel must not only weigh traditional considerations, but also take into account the dangers and possibilities of the sentencing guidelines. The starting point is a thorough understanding of the guideline sentencing process.

BEFORE THE ADVENT OF THE SENTENCING GUIDELINES, federal trial courts enjoyed broad discretion to sentence defendants within the statutory limit. Sentences were largely insulated from appellate judicial review, although the time in prison could be reduced by the parole commission. The guidelines radically changed this system. Under guideline sentencing, the court's discretion to fix a sentence is cabined within a guideline range that may be a small fraction of the statutory limit. The guideline range results from the combination of two numerical values, an offense level and a criminal history category. The two values form the axes of a grid, called the sentencing table; together, they specify a range in the table, expressed in months. The guideline range fixes the limits of the sentence, unless the court determines that an inadequately considered factor warrants imposition of a sentence outside the range. Guideline sentences are not parolable, but they are subject to limited review on appeal.

To introduce the attorney to guideline sentencing, this paper examines the statutory basis of guideline sentencing and reviews the structure of the guidelines themselves. It describes the mechanics of applying the guidelines to a typical case, discusses plea bargaining, and warns of traps for the unwary.

This treatment is not exhaustive; it provides an overview that will facilitate gaining a working knowledge of guideline sentencing.

The Basic Statutory System

Guideline sentencing was established by the Sentencing Reform Act. The Act created determinate sentencing: by eliminating parole and greatly restricting good time, it ensured that defendants would serve nearly all the sentence that the court imposed. The responsibility for shaping these determinate sentences was delegated to the United States Sentencing Commission, an independent body within the judicial branch. The Commission's enabling legislation, codified at 28 U.S.C. §§ 991–998, includes a number of congressional directives on the content of the guidelines. It states the purposes of the Commission, including the parallel goals of providing “certainty and fairness” in sentencing, and avoiding “unwarranted sentencing disparities.” § 991(b)(1)(B). The principal provisions that directly govern sentencing are codified in the criminal code, 18 U.S.C. chs. 227 (Sentences), 229 (Postsentence Administration), 232 (Miscellaneous Sentencing Provisions), 232A (Special Forfeiture of Collateral Profits of Crime), and 235 (Appeal).

Imposition of Guideline Sentence; Departure.

Under the guideline regime, the district court's sentencing authority is no longer limited only by the statutory penalty range for the substantive offense. It is also restricted by 18 U.S.C. § 3553. This section directs the court to consider a broad variety of factors before imposing sentence. § 3553(a). It does not, however, grant an equally broad range of sentencing discretion. To the contrary, the section requires the court to "impose a sentence of the kind, and within the range" specified in the applicable guideline, absent a valid ground for departure. § 3553(b). A departure is authorized only when "the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." *Id.*

Guidelines and Statutory Minimums. While the guidelines control sentencing discretion under the Act, they do not supersede the sentencing limits prescribed by statute. If the guidelines call for a sentence above the statutory maximum, or below a statutory minimum, the statutory limit controls. *See* United States Sentencing Guideline (U.S.S.G.) §5G1.1. A number of federal statutes include minimum sentences that can trump the otherwise applicable guideline range; some, like the federal "three strikes" law, mandate life imprisonment. 18 U.S.C. § 3559(c). Statutory minimum sentences regularly come into play in two common types of federal prosecutions: drug cases and firearms cases.

Drug cases. The federal drug statutes provide two types of mandatory minimum sentences. One is based on the amount of drugs involved; for certain drugs in certain quantities, 21 U.S.C. §§ 841(b) and 960(b) provide minimum sentences of 5 or 10 years' imprisonment. The circuits are divided over whether drug amount must be alleged in the indictment and proved to the jury to trigger the statute's mandatory minimum sentences.¹

The other type of mandatory minimum is based on criminal history; for defendants who have previously been convicted of drug offenses, the statutes establish increasing minimum sentences, up to life imprisonment. The prior conviction need not be alleged in the indictment or proved at trial; however, the government must follow the notice and hearing procedures of 21 U.S.C. § 851 to obtain a recidivism-based enhancement.

Firearms cases. Title 18 U.S.C. § 924, which sets out the penalties for most common federal firearm-possession offenses, includes two subsections that require significant minimum prison sentences. One is § 924(c), which punishes firearm possession during a drug-trafficking or violent crime. It provides graduated minimum sentences, starting at 5 years and increasing to life imprisonment, depending on the type of firearm, how it was employed, and whether the defendant has a prior § 924(c) conviction. The statute requires that a sentence under § 924(c) run consecutively to any other sentence. A § 924(c) charge is often (but not always) accompanied by a charge on the underlying substantive offense; the guidelines provide special rules for determining the § 924(c) sentence, based on the number of counts, the mandatory consecutive nature of the penalty, and the defendant's criminal history. U.S.S.G. §2K2.4, §4B1.1(c)(2), §5G1.2(e).

The other mandatory minimum is § 924(e), the Armed Career Criminal Act. It provides the applicable penalty for certain defendants convicted of unlawful firearm possession under 18 U.S.C. § 922(g). A defendant convicted under § 922(g) normally faces a maximum term of 10 years' imprisonment. Section 924(e)(1) increases this punishment range, to a minimum of 15 years and a maximum of life imprisonment, if a defendant has three prior convictions for violent felonies or serious drug offenses. "Violent felony" and "serious drug offense" are defined by statute. § 924(e)(2). The Sentencing Commission has promulgated an armed career criminal guideline, U.S.S.G. §4B1.4, which can require a sentence far above the statute's 15-year minimum.

Sentencing Below a Statutory Minimum. Federal law authorizes a sentence below a statutory minimum in only two circumstances: when a

1. *Compare United States v. Leachman*, 309 F.3d 377, 381–83 (6th Cir. 2002) (drug quantity setting statutory minimum is a sentencing factor that need not be proved to jury beyond reasonable doubt) (citing *Harris v. United States*, 122 S. Ct. 2406 (2002)), with *United States v. Velasco-Heredia*, No. 00-50107, 2003 WL 152767, at *4–5 (9th Cir. Jan. 21, 2003) (minimum drug sentence inapplicable without proof to jury beyond reasonable doubt)

(distinguishing *Harris*) and *United States v. Martinez*, 2002 WL 31780195 (D. Mass. Dec. 12, 2002) (same).

defendant cooperates, and when he meets the requirements of a limited “safety valve.”

Cooperation. The court, on motion by the government, may “impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant’s substantial assistance in the investigation or prosecution of another person who has committed an offense.” 18 U.S.C. § 3553(e). *See also* FED. R. CRIM. P. 35(b) (implementing § 3553(e)). The court is required to follow the guidelines and policy statements in imposing the reduced sentence; policy statement §5K1.1, discussed in more detail below, sets out the factors to be considered in imposing sentence on a government substantial-assistance motion. A §5K1.1 motion will not authorize a sentence below the statutory minimum unless the government specifically requests such a sentence. *Melendez v. United States*, 518 U.S. 120 (1996).

Safety valve. Under 18 U.S.C. § 3553(f), the statutory minimum is removed for certain drug crimes that did not result in death or serious injury, if the court finds that the defendant has minimal criminal history; was not violent, armed, or a high-level participant; and provided the government with truthful, complete information regarding the offense of conviction and related conduct. Unlike § 3553(e), the § 3553(f) “safety valve” does not require a government motion, but the government must be allowed to make a recommendation to the court.

The Sentencing Commission has promulgated a safety-valve guideline, §5C1.2, which mirrors the requirements of § 3553(f), but may reduce the guideline sentence even when no statutory minimum is in play.

No Parole; Restricted Good-Time Credit.

Federal prisoners do not receive parole, and they can receive only limited credit to reward satisfactory behavior in prison. Credit is fixed at a maximum of 54 days per year for a sentence greater than one year, but less than life. 18 U.S.C. § 3624(b). The Bureau of Prisons may reduce the time to be served by up to an additional year if a prisoner serving imprisonment for a nonviolent offense completes a substance-abuse treatment program. § 3621(e)(2).

Probation and Supervised Release. While the guideline regime does not allow parole, it does

authorize non-incarcerative sentences of two types: probation and supervised release.

Probation. Probation may be imposed in lieu of imprisonment in very limited circumstances. Probation is prohibited by statute (1) for Class A or Class B felonies (offenses carrying maximum terms of 25 years or more, life, or death); (2) for offenses that expressly preclude probation; and (3) for a defendant who is sentenced at the same time to imprisonment for a non-petty offense. 18 U.S.C. § 3561(a). Even when probation is statutorily permitted, the guidelines bar straight probation unless the bottom of the guideline range is zero, or the court departs downward. *See* U.S.S.G. §5B1.1(a), §5C1.1. (See discussion of Chapter Five under “The Guidelines Manual.”)

Supervised release. Unlike probation, supervised release is imposed in addition to an imprisonment sentence. Some statutes mandate imposition of supervised release, and the pertinent guideline requires supervised release following any imprisonment sentence greater than 1 year. U.S.S.G. §5D1.1(a). Except as otherwise provided, the authorized maximum terms increase with the grade of the offense, from 1 year, to 3 years, to 5 years. 18 U.S.C. § 3583(b). Supervised release begins on the day the defendant is released from imprisonment and runs concurrently with any other term of release, probation, or parole. 18 U.S.C. § 3624(e); *United States v. Johnson*, 529 U.S. 53 (2000).

Conditions and revocation. The court has discretion in imposing some conditions of probation and supervised release. However, federal law makes a number of conditions mandatory, including that the defendant submit to DNA collection in some cases, and to drug testing in all cases. 18 U.S.C. §§ 3563(a)(5), (a)(9), 3583(d). The court may ameliorate or suspend the drug-testing condition if the defendant presents a low risk of future substance abuse.

Probation or supervised release may be revoked upon violation of any condition. Revocation is mandatory for possessing a firearm or controlled substance, refusing to comply with drug-testing conditions, or testing positive for an illegal controlled substance more than three times over the course of a year. 18 U.S.C. §§ 3565(b), 3583(g). In accordance with Sentencing Commission guidelines, the court must consider whether the availability of

treatment programs, or the defendant's participation in them, warrants an exception from mandatory revocation for failing a drug test. §§ 3563(e), 3583(d).

Upon revocation of probation, the court may impose any sentence under the general sentencing provisions available in 18 U.S.C. chapter 227, subchapter A. § 3565(a)(2). Upon revocation of supervised release, the court may imprison the defendant up to the maximum terms listed in § 3583(e)(3), even if the listed sentence is longer than the term of supervised release originally imposed. If the court imposes less than the maximum prison term on revocation of supervised release, it may impose another supervised release term to begin after imprisonment. § 3583(h).

The Sentencing Commission has promulgated non-binding policy statements for determining the propriety of revocation and the sentence to be imposed. U.S.S.G. Ch.7. (See discussion of Chapter Seven under "The Guidelines Manual.")

Fines and Restitution. Federal sentencing law authorizes both fines and restitution orders. In general, the maximum fine for an individual convicted of a Title 18 offense is \$250,000 for a felony, \$100,000 for a Class A misdemeanor not resulting in death, and \$5,000 for any lesser offense. 18 U.S.C. § 3571(b). A higher maximum fine may be specified in the law setting forth the offense, § 3571(b)(1), and an alternative fine based on gain or loss is possible, § 3571(d). Interest accrues on any fine of more than \$2,500 that is not paid in full before the fifteenth day after judgment, and additional penalties apply to a delinquent or defaulted fine. § 3612(f)–(g). A defendant who knowingly fails to pay a delinquent fine is subject to resentencing, and a defendant who willfully fails to pay a fine may be prosecuted for criminal default. §§ 3614, 3615.

Restitution is mandatory for crimes of violence, property crimes, and product tampering. 18 U.S.C. § 3663A(c). It may also be mandated by the statute setting out the substantive offense. A restitution order may include expenses incurred by the victim while participating in the investigation or prosecution of the case, or while attending case proceedings. § 3663(b)(4).

While the guidelines ordinarily make both fines and restitution mandatory, a defendant's inability to

pay, now and in the future, may support nominal restitution payments. U.S.S.G. §5E1.1. It may also support a lesser fine, or alternatives such as community service. §5E1.2.

Review of a Sentence. Under 18 U.S.C. § 3742, either the defendant or the government may appeal a sentence on the ground that it was (1) "imposed in violation of law"; (2) "imposed as a result of an incorrect application of the sentencing guidelines"; or (3) "imposed for an offense for which there is no sentencing guideline and is plainly unreasonable." § 3742(a)–(b). Additionally, the defendant may appeal a departure above the guideline range, and the government may appeal a departure below it. § 3742(a)(3), (b)(3). These appeal rights are limited if, pursuant to Federal Rule of Criminal Procedure 11(c)(1)(C), the parties enter into a specific sentence agreement. § 3742(c). They may also be limited by an appeal waiver of the type mentioned in Rule 11(b)(1)(N). (See discussion of Rule 11(c)(1)(C) under "Plea Bargaining Under the Guidelines," and discussion of appeal waivers under "Some Traps for the Unwary.")

Sentence Correction and Reduction. Federal law severely limits the sentencing court's authority to correct or reduce a sentence after it is imposed. Under Federal Rule of Criminal Procedure 35(a) the court may correct "arithmetical, technical, or other clear error" in the sentence within 7 days after sentencing.

Rule 35(b) authorizes the court to reduce the sentence on motion of the government, to reflect a defendant's post-sentence assistance in the investigation or prosecution of another person who has committed an offense. With limited exceptions, the motion must be made within one year after sentencing.

In two other circumstances, reduction is authorized under 18 U.S.C. § 3582(c): (1) on motion of the Director of the Bureau of Prisons, if the court finds that "extraordinary and compelling reasons warrant such a reduction"; and (2) for a defendant whose sentencing range was later lowered by a guideline amendment designated as retroactive by the Sentencing Commission. (See discussion of guideline amendments under "Some Traps for the Unwary.")

Petty Offenses; Juveniles. The sentencing guidelines do not apply to petty offenses (offenses carrying a maximum term of six months or less) or to

juvenile delinquency cases. U.S.S.G. §1B1.9, §1B1.12, p.s. But because the Juvenile Delinquency Act bars committing a juvenile to official detention for longer than would be available for a similarly-situated adult, the sentence imposed on a juvenile delinquent may not exceed that applicable to an adult under the guidelines, absent a ground for departure. See 18 U.S.C. § 5037(c)(1)(B); U.S.S.G. §1B1.12, p.s.; *United States v. R.L.C.*, 503 U.S. 291 (1992).

Statutory Amendments. The Sentencing Reform Act's provisions have been substantively amended since their enactment in 1984. The Ex Post Facto Clause may bar the retrospective application of any harmful substantive amendment of the Act's sentencing provisions. See *Johnson v. United States*, 529 U.S. 694, 699–701 (2000) (discussing effect of Ex Post Facto Clause on Act's amended provisions regarding supervised release revocation); cf. *Lynce v. Mathis*, 519 U.S. 433 (1997) (retroactive amendment of state sentencing law awarding reduced jail credits violated Ex Post Facto).

The Guidelines Manual

The *Guidelines Manual* contains all the guidelines, policy statements, and commentary promulgated by the Sentencing Commission to determine the sentence to be imposed in a federal case. It comprises eight chapters and three appendices. To undertake the defense of a guidelines case, counsel must have a thorough understanding of Chapters One, Three, Four, Five, and Six, as well as all sections of Chapter Two, Offense Conduct, that may arguably apply to the case. In defending a revocation of probation or supervised release, counsel must study the policy statements in Chapter Seven. If the defendant is an organization, Chapter Eight, Sentencing of Organizations, applies.

Chapter One: Introduction and General

Application Principles. In Chapter 1, Part A, the Commission states its authority and statutory mission, defines its basic approach, and discusses its resolution of major issues. This discussion is important to an understanding of key guidelines concepts, such as relevant conduct and departures. In Part B, the Commission provides general application principles: definitions, the rules for determining the applicable guideline, and the significance of commentary. Perhaps the most

important of these principles are the rules for determining relevant conduct.

Relevant conduct. The concept of relevant conduct is central to guideline sentencing. The Commission developed the concept as part of its effort to create a modified “real offense” sentencing system—a system under which the court punishes the defendant based on its determination of his actual conduct, not the more limited conduct of which he may have been charged or convicted. See U.S.S.G. Ch.1, Pt.A(4)(a), p.s.

The relevant conduct guideline requires sentencing based on “all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant . . . that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense.” §1B1.3(a)(1)(A). When others were involved, the defendant's guideline range will also reflect “all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity,” whether or not a conspiracy was charged. §1B1.3(a)(1)(B).² For many offenses, such as drug crimes, relevant conduct extends even further, to “acts and omissions” that were not part of the offense of conviction, but “were part of the same course of conduct or common scheme or plan as the offense of conviction.” §1B1.3(a)(2). Relevant conduct need not be included in formal charges. §1B1.3, comment. (backg'd). It can include conduct underlying dismissed or even acquitted counts, provided the sentencing judge finds the conduct was reliably established by a preponderance of the evidence. *United States v. Watts*, 519 U.S. 148 (1997) (per curiam).

While relevant conduct affects every stage of representation, it is especially important in the context of plea bargaining. (See discussion under “Plea Bargaining Under the Guidelines.”)

Guidelines, policy statements, and commentary.

As required by the Sentencing Reform Act, the *Guidelines Manual* includes both sentencing

2. Relevant conduct, however, does not include the conduct of conspiracy members before the defendant joined the conspiracy, even if the defendant knows of that conduct. §1B1.3, comment. (n.2).

“guidelines,” 28 U.S.C. § 994(a)(1), and “general policy statements regarding application of the guidelines,” § 994(a)(2). Guidelines are binding: they must be used to determine the sentence, absent a ground for departure. *See* § 994(a)(1); U.S.S.G. Ch.1, Pt.A(4)(b), para. 1, p.s. Policy statements are intended to explain how guidelines are to be applied. Although they must be considered by the court, § 994(a)(2), they are not usually binding. When, however, “a policy statement prohibits a district court from taking a specified action,” failure to follow it constitutes guideline misapplication. *Williams v. United States*, 503 U.S. 193, 201 (1992).

The Commission also issues commentary to accompany both guidelines and policy statements. The commentary “may interpret the guideline or explain how it is to be applied. Failure to follow such commentary could constitute an incorrect application of the guidelines,” U.S.S.G. §1B1.7; *see also Stinson v. United States*, 508 U.S. 36, 38 (1993). Commentary may also “suggest circumstances which, in the view of the Commission, may warrant departure from the guidelines.” §1B1.7.

Chapter Two: Offense Conduct. Offense conduct forms the vertical axis of the sentencing table. (The table is included as an appendix to this paper.) Offense conduct guidelines are set out in Chapter Two. The chapter has 18 parts; each part has multiple guidelines, linked to particular statutory offenses. A single guideline may cover one statutory offense, or many. When no guideline has been promulgated for an offense, §2X5.1 applies. Part X also provides the guidelines for certain conspiracies, attempts, and solicitations, as well as aiding and abetting, accessory after the fact, and misprision of a felony.

Each guideline provides one or more base offense levels for a particular offense. A guideline may also have specific offense characteristics that adjust the base level up or down, and it may cross-reference other guidelines that invoke a higher offense level. While the initial determination of the applicable guideline section is determined by the offense of conviction, the court will normally look to relevant conduct in choosing among multiple base offense levels, determining offense characteristics, and applying cross-references. Additionally, if a plea agreement “contain[s] a stipulation that specifically establishes a more serious offense,” the court must

use the guideline applicable to the more serious stipulated offense. U.S.S.G. §1B1.2(a).³

For some offenses, Chapter Two includes commentary encouraging departures from the prescribed offense level. *See, e.g.*, §2B1.1, comment. (n.15) (encouraging upward or downward departures for some economic offenses); §2D1.1, comment. (n.14) (downward departure in certain reverse-sting drug cases); *id.* (n.16) (upward departure for very large scale drug offenses).

Drug offenses. In drug and drug-conspiracy cases, the offense level is generally determined by drug type and quantity, as set out in the drug quantity table in guideline §2D1.1(c). The table includes a very wide range of offense levels, from a low of 6 to a high of 38; for defendants who played a mitigating role in the offense, however, the offense level is capped at 30. U.S.S.G. §2D1.1(a)(3). (See discussion of role in the offense under “Chapter Three: Adjustments.”)

To determine the applicable offense level the court uses “the entire weight of any mixture or substance containing a detectable amount of the controlled substance.” U.S.S.G. §2D1.1(c) (drug quantity table) note *(A). “Mixture or substance” does not include “materials that must be separated from the controlled substance” before it can be used. §2D1.1, comment. (n.1). When no drugs are seized or “the amount seized does not reflect the scale of the offense,” the court must “approximate the quantity.” *Id.* comment. (n.12). In conspiracy cases, and other cases involving agreements to sell a controlled substance, the agreed-upon quantity is used to determine the offense level, unless the completed transaction establishes a different quantity, or the defendant demonstrates that he did not intend to produce the negotiated amount, or was not reasonably capable of producing it. *Id.* With the exception of methamphetamine, amphetamine, and PCP, drug purity is not a factor in determining the offense level. However, “unusually high purity may warrant an upward departure.” *Id.* comment. (n.9).

3. For this exception to apply, the stipulation must establish every element of the more serious offense, *Braxton v. United States*, 500 U.S. 344 (1991), and the parties must “explicitly agree that the factual statement or stipulation is a stipulation for such purposes.” §1B1.2, comment. (n.1).

The drug guidelines include provisions that raise the offense level for specific aggravating factors, such as death, serious bodily injury, or possession of a firearm. Guideline §2D1.1(b)(6) provides a 2-level reduction if the defendant meets the criteria of the safety-valve guideline, §5C1.2. If the defendant is subject to a statutory minimum of 5 years, however, the guideline establishes a minimum offense level of 17. §5C1.2(b).

Economic offenses. For many economic offenses (including theft, fraud, and property destruction) the offense level is determined under §2B1.1. The guideline is similar in structure to the drug-offense guideline, in that the offense level is generally driven by an amount—the amount of loss. The guideline broadly defines “loss” as the greater of actual loss or the loss the defendant intended, even if the intended loss was “impossible or unlikely to occur.” §2B1.1, comment. (n.2(A)(ii)). In addition to its broad definition of loss, the guideline includes many specific offense adjustments that can increase the offense level.

Chapter Three: Adjustments. Chapter Three sets out general offense level adjustments that apply in addition to the offense-specific adjustments of Chapter Two. Some of these general adjustments relate to the offense conduct: victim-related adjustments, adjustments based on the defendant’s role in the offense, and adjustments based on the defendant’s use of position, of special skills, or of minors. Other Chapter Three adjustments relate to post-offense conduct, including flight from authorities and obstruction of justice, as well as acceptance of responsibility for the offense. Chapter Three also provides the rules for determining the guideline range when the defendant is convicted of multiple counts.

Role in the offense. In any offense committed by more than one participant, a defendant may receive an upward adjustment for aggravating role or a downward adjustment for mitigating role. U.S.S.G. Ch.3, Pt.B, intro. comment. Aggravating-role adjustments range from 2 to 4 levels, depending on the defendant’s supervisory status and the number of participants in the offense. §3B1.1. Mitigating-role adjustments likewise range from 2 to 4 levels, depending on whether the defendant’s role is characterized as minor, minimal, or falling in between. §3B1.2. The determination of a defendant’s role is made on the basis of all relevant

conduct, not just the offense of conviction. Thus, a defendant may sometimes face an upward adjustment (or seek a downward adjustment) even when he is the only person charged in the indictment, so long as more than one person participated. However, the fact that a defendant is not accountable for the relevant conduct of others does not disqualify him from receiving a reduced offense level. §3B1.2, comment. (n.3(A)).

Obstruction. A defendant who willfully obstructed the administration of justice will receive an upward adjustment. U.S.S.G. §3C1.1. Obstruction of justice can occur during the investigation, prosecution, or sentencing of the offense of conviction, of relevant conduct, or of a closely related offense. Conduct warranting the adjustment includes committing or suborning perjury,⁴ destroying or concealing material evidence, or “providing materially false information to a probation officer in respect to a presentence or other investigation for the court.” *Id.* comment. (n.4). Some uncooperative behavior or misleading information, such as lying about drug use while on pretrial release, ordinarily does not justify an upward adjustment. *Id.* comment. (n.5). While fleeing from arrest does not ordinarily qualify as obstruction, *id.*, reckless endangerment of another during flight will support a separate upward adjustment under §3C1.2.

Multiple counts. When a defendant has been convicted of more than one count, the multiple-count guidelines of Chapter 3, Part D must be applied. These guidelines produce a single offense level by grouping counts together, assigning an offense level to the group, and, if there is more than one group, combining the group offense levels together.

The guidelines group counts together when they involve “substantially the same harm,” §3D1.2, unless a statute requires imposition of a consecutive sentence, §3D1.1(b). If the offense level is based on aggregate harm (such as the amount of theft losses or the weight of controlled substances), the level for the group is determined by the aggregate for all the

4. To support an obstruction adjustment based on perjury at trial, the court must “make independent findings necessary to establish a willful impediment to or obstruction of justice,” or an attempt to do so, within the meaning of the federal perjury statute. *United States v. Dunnigan*, 507 U.S. 87, 95 (1993).

counts combined. §3D1.3(b). Otherwise, the offense level for the group is the level for the most serious offense. §3D1.3(a). When there is more than one group of counts, §3D1.4 usually requires an increase in the offense level to account for them. The combined offense level can be up to 5 levels higher than the level of any one group. Even when a defendant pleads guilty to a single count, grouping may increase the offense level if the plea agreement stipulates to an additional offense, or if the conviction is for conspiracy to commit more than one offense. §1B1.2(c)–(d) & comment. (n.4).

Acceptance of responsibility. Under Chapter 3, Part E, a defendant who “clearly demonstrates acceptance of responsibility for his offense” ordinarily receives a downward adjustment of 2, or in certain cases, 3 offense levels. Pleading guilty provides “significant evidence” of acceptance of responsibility, but does not win the adjustment as a matter of right. §3E1.1, comment. (n.3). On the other hand, a defendant is not “automatically preclude[d]” from receiving the adjustment by going to trial. *Id.* comment. (n.2). (This subject is discussed more fully under “Plea Bargaining Under the Guidelines.”) A defendant who received an upward adjustment for obstruction under §3C1.1, however, is not ordinarily entitled to a downward adjustment for acceptance of responsibility. *See* §3E1.1, comment. (n.4).

Chapter Four: Criminal History and Criminal Livelihood. The defendant’s criminal history forms the horizontal axis of the sentencing table. The table includes six criminal history categories; the guidelines in Chapter Four, Part A translate the defendant’s prior record into one of these categories by assigning points for qualifying prior convictions and juvenile adjudications. The number of points scored for a prior conviction is based primarily on length of the sentence imposed. U.S.S.G. §4A1.1. There is also a recency factor: criminal history points are added for committing the instant offense within 2 years after release from imprisonment for certain prior convictions, or while under any form of criminal justice sentence.

No points are added if a prior conviction was sustained for conduct that is part of the instant offense. §4A1.2(a)(1). Other criminal convictions or juvenile adjudications are not counted because of staleness, their minor nature, or other reasons,

such as constitutional invalidity. §4A1.2.⁵ And sentences imposed in “related” cases are treated as one sentence for the criminal history calculation. §4A1.2(a)(2) & comment. (n.3).

Criminal history departure. An important policy statement provides that when “the criminal history category does not adequately reflect the seriousness of the defendant’s past criminal conduct or the likelihood that the defendant will commit other crimes,” the court may depart from the guideline range. U.S.S.G. §4A1.3, p.s. This policy statement may support either an upward or a downward departure. However, it does not authorize a departure below criminal history category I, or below the statutory minimum.

Repeat offenders. While Part A of Chapter Four provides the general rules for determining the criminal history category, Part B may require significant enhancements to both criminal history category and offense level for certain repeat offenders: career offenders, armed career criminals, and repeat child-sex offenders.

Career offender. The Sentencing Commission promulgated the “career offender” guideline, §4B1.1, in response to the Sentencing Reform Act’s directive that the guideline ensure that certain repeat offenders receive a term of imprisonment at or near the statutory maximum. 28 U.S.C. § 994(h). The career offender guideline applies to a defendant convicted of a third offense defined as either a crime of violence or a controlled substance offense. In every case, guideline §4B1.1 places the defendant in the highest criminal history category, VI. The guideline simultaneously increases the offense level to produce a guideline range approximating the statutory maximum for the offense of conviction. Chapter Four’s definitions and instructions for computing criminal history apply to the counting of convictions under the career offender guideline, §4B1.2, comment. (n.3); therefore, questions of remoteness, invalidity, or whether prior convictions were “related” may be of utmost importance.

Armed career criminal. Guideline §4B1.4 applies to a person convicted under the Armed Career

5. The guidelines, however, “do not confer upon the defendant any right to attack collaterally a prior conviction or sentence beyond any such rights otherwise recognized in law.” §4A1.2, comment. (n.6).

Criminal Act, 18 U.S.C. § 924(e). Like the career offender guideline, the armed career criminal guideline operates on both axes of the sentencing table; it frequently produces a guideline range above § 924(e)'s mandatory minimum 15-year term. Unlike the career offender guideline, however, §4B1.4 is not limited by guideline §4A1.2's rules for counting prior sentences. §4B1.4, comment. (n.1). Unlike a career offender, an armed career criminal is not automatically placed in criminal history category VI; however, he cannot receive a score below category IV. §4B1.4(c).

Repeat child-sex offender. For repeat child-sex offenders, guideline §4B1.5 works in concert with the career offender guideline to ensure long imprisonment terms. The guideline reaches more defendants than §4B1.2, applying the increased career offender offense levels to a defendant even if he has only one prior child-sex offense. §4B1.5(a)(1). And even a defendant with no prior child-sex conviction may be subject to a significant offense level increase if he “engaged in a pattern of activity involving prohibited sexual conduct.” §4B1.5(b).

While §4B1.5 covers a broad range of child-sex offenses, it does not apply to trafficking in, or receipt or possession of, child pornography. §4B1.5, comment. (n.2).

Chapter Five: Determining the Sentence;

Departures. Chapter Five includes the sentencing table, the grid of sentencing ranges produced by the intersection of offense levels and criminal history categories. The table's grid is divided into four “zones.” These zones determine a defendant's eligibility for “straight” probation, or for a “split” sentence (probation or supervised release conditioned upon some confinement). Straight probation is available if a defendant's sentencing range is in Zone A (all the ranges in Zone A are 0 to 6 months). §5B1.1(a)(1), §5C1.1(b). A split sentence is available if the sentencing range is in Zone B or C. A defendant in Zone B can be sentenced to less than the bottom of the imprisonment range by substituting a term of probation or supervised release that requires intermittent confinement, community confinement, or home detention. §5B1.1(a)(2), §5C1.1(c). For sentencing ranges in Zone C, at least half the minimum guideline term must be served in prison. §5C1.1(d). If a defendant's sentencing range is in

Zone D, the minimum term must be served in prison. §5C1.1(f).

Chapter Five also provides detailed guidelines for imposing probation, fines, restitution, and supervised release. Part G of the chapter generally explains the interplay of the guideline range with any applicable statutory minimum or maximum (discussed under “Plea Bargaining Under the Guidelines”). It also sets out the guideline requirements for concurrent and consecutive sentencing on multiple counts, and the rules for sentencing a defendant who is already under another term of imprisonment.

Chapter 5, Part H sets out policy statements on the relevance to sentencing of certain offender characteristics, including age, education and vocational skills, employment record, family ties and responsibilities, and community ties. The Commission's policy is that these characteristics are “not ordinarily relevant” in determining the propriety of a departure. U.S.S.G. Ch.5, Pt.H, intro. comment. The operative word is “ordinarily”—in extraordinary cases, one or more of those characteristics may support a departure. Even in the ordinary case, those characteristics may be relevant to sentencing decisions other than departure, such as where to fix the sentence within the guideline range. Other characteristics, however, are never relevant to the determination of a sentence: race, sex, national origin, creed, religion, and socio-economic status. §5H1.10, p.s.

Chapter 5, Part K provides policy statements on departures. Section 5K1.1 authorizes a downward departure—on the government's motion—if the defendant “has provided substantial assistance in the investigation or prosecution of another person who has committed an offense.” (See discussion of cooperation under “Plea Bargaining Under the Guidelines.”) For a departure on a ground other than cooperation, policy statement §5K2.0 states general principles. The test for such a departure is whether the case lies outside the “heartland” of typical cases covered by the guideline. Part K discusses a number of particular factors that may warrant departure but are not susceptible of comprehensive advance analysis by the Commission. While most of these factors point to an upward departure, six of them may support a downward departure: (1) victim's wrongful provocation, (2) commission of a crime to avoid a perceived greater

harm, (3) coercion and duress, (4) diminished capacity, (5) voluntary disclosure of the offense, and (6) aberrant behavior.⁶ The Commission acknowledges that the factors set out in Part K, and elsewhere in the manual, are not exhaustive. “Any case may involve factors . . . that have not been given adequate consideration by the Commission.” §5K2.0, p.s. Even when an offender characteristic or other circumstance is “not ordinarily relevant” to departure, “a combination of such characteristics or circumstances” may distinguish the case significantly from the “heartland” cases. The Commission believes, however, “that such cases will be extremely rare.” §5K2.0, p.s., comment.; *see also* Ch.5, Pt.H, intro. comment.⁷ If the court intends to depart from the guideline range on a ground not identified in the presentence report or a pre-hearing submission, it must “provide reasonable notice that it is contemplating such ruling, specifically identifying the grounds for the departure.” U.S.S.G. §6A1.2, p.s., comment. (n.1); FED. R. CRIM. P. 32(h).

Chapter Six: Sentencing Procedures and Plea Agreements. Chapter Six sets forth procedures for determining facts relevant to sentencing. It provides policy statements for preparing and disclosing the presentence report, resolving disputed sentencing issues, and considering plea agreements and stipulations.

In resolving factual disputes, the court is not bound by the rules of evidence, but may consider any information that “has sufficient indicia of reliability to support its probable accuracy.” U.S.S.G. §6A1.3(a), p.s. The Commission suggests that the standard of proof for sentencing factors is a preponderance of the evidence, *id.* comment. para. 4,⁸ and the burden of ultimate persuasion rests on

the party seeking to adjust the sentence—upward or downward. While “[w]ritten statements of counsel or affidavits of witnesses” may often provide an adequate basis for sentencing findings, “[a]n evidentiary hearing may sometimes be the only reliable way to resolve disputed issues.” *Id.* comment. para. 2.

Chapter 6, Part B sets out the *Guideline Manual’s* procedures and standards for accepting plea agreements. The standards vary with the type of agreement. See FED. R. CRIM. P. 11(c)(1). While the parties may stipulate to facts as part of a plea agreement, “[t]he court is not bound by the stipulation, but may with the aid of the presentence report, determine the facts relevant to sentencing.” §6B1.4(d), p.s. Before entry of a dispositive plea, prosecutors are encouraged, but not required, to disclose to the defendant “the facts and circumstances of the offense and offender characteristics, then known to the prosecuting attorney, that are relevant to the application of the sentencing guidelines.” §6B1.2, p.s., comment. para. 5. (Plea agreements are discussed under “Plea Bargaining Under the Guidelines.”)

Chapter Seven: Violations of Probation and Supervised Release. This chapter sets out policy statements applicable to revocation of probation and supervised release. The policy statements classify violations of conditions, guide probation officers in reporting those violations to the court, and propose dispositions for them. For violations leading to revocation, policy statement §7B1.4 provides an imprisonment table similar in format to the sentencing table. Unlike the ranges in the sentencing table, the ranges in the revocation table are not

6. The Sentencing Commission has additionally determined that two factors can never support a departure: lack of guidance as a youth and post-sentencing rehabilitative efforts. §5H1.12, p.s., §5K2.19, p.s.

7. For an extensive analysis of the *Guidelines Manual’s* methodology of departures, see *Koon v. United States*, 518 U.S. 81 (1996). The Commission has incorporated *Koon’s* analysis into the commentary to policy statement §5K2.0.

8. Certain guidelines may require a higher standard of proof in specific contexts. *See, e.g.*, U.S.S.G. §3A1.1(a)

(to increase offense level for hate-crime motivation, court must find supporting facts beyond a reasonable doubt). Due process may likewise require a higher standard for certain guideline applications, and departures. *See, e.g.*, *United States v. Kikumura*, 918 F.2d 1084, 1103 (3d Cir. 1990) (when the court “departs upwards dramatically,” due process requires that “factual findings must be supported by clear and convincing evidence, and hearsay statements cannot be considered unless other evidence indicates that they are reasonably trustworthy”) (footnote omitted); *United States v. Jordan*, 256 F.3d 922, 927–30 (9th Cir. 2001) (applying six-factor test to determine whether guideline application has “disproportionate effect” that requires application of clear and convincing evidence standard); *cf. Watts*, 519 U.S. at 156–57 & n.2 (noting possible constitutional challenge to preponderance standard for relevant conduct).

binding, but the court is required by statute to consider them. *See* 18 U.S.C. § 3553(a)(4)(B).

Chapter Eight: Sentencing of Organizations.

When a convicted defendant is an organization rather than an individual, sentencing is governed by Chapter Eight.

Appendices. The official *Guidelines Manual* includes three appendices. Appendix A is an index specifying the offense conduct guideline or guidelines that apply to a conviction under a particular statute. Appendix B sets forth selected sentencing statutes. Appendix C documents the amendments to the *Guidelines Manual* since its initial publication in 1987.

Applying the Guidelines

Step-by-Step Application. Step-by-step instructions for using the guidelines are prescribed in guideline §1B1.1. The Commission has published worksheets which may assist newcomers to the guidelines. The worksheets for individual defendants are appended to this paper.

- Prepare a separate Worksheet A (Offense Level) for each count of conviction. Determine the applicable guideline by reference to guideline §1B1.2 and Appendix A—Statutory Index. A conviction for conspiracy to commit more than one offense is treated as if the defendant were convicted on a separate conspiracy count for each offense. §1B1.2(d). If the defendant has entered into a plea agreement stipulating to having committed an additional offense, the stipulated offense must be treated as an additional count of conviction. §1B1.2(c).

- From the offense conduct guideline in Chapter Two, determine the base offense level and any applicable specific offense characteristics. Offense conduct is usually determined by reference to the relevant-conduct guideline, which frequently includes conduct from dismissed or acquitted counts, or even uncharged offenses. *See* §1B1.3, comment. (backg'd). Do not overlook any cross-reference to another offense guideline.

- Make all applicable adjustments from Chapter Three, Parts A, B, and C: victim-related adjustments, role in the offense, and obstruction. Unless otherwise specified, these adjustments are

based upon all relevant conduct as defined in guideline §1B1.3(a).

- If more than one count is to be scored, use Worksheet B to apply Chapter Three, Part D (Multiple Counts), to group the counts and adjust the offense level if required.

- Consider the anticipated adjustment, if any, for acceptance of responsibility under Chapter Three, Part E.

- Referring to Chapter Four, Part A, use Worksheet C to determine the criminal history category. Take care to examine any issues of exclusion, staleness, relatedness, or invalidity of prior convictions.

- Proceeding to Worksheet D, check carefully whether the career offender guideline, §4B1.1, or the criminal livelihood guideline, §4B1.3, applies. In an armed career criminal case, apply guideline §4B1.4. In a case of sex offense against a minor, check whether guideline §4B1.5 applies. Remember that these guidelines can dramatically increase the applicable range.

- Using the total offense level and the criminal history category, determine the applicable guideline range from the sentencing table, Chapter Five, Part A. From this range, determine all applicable sentencing requirements and options from Chapter Five, Parts B through G. For each count of conviction, consider whether the statutory maximum or minimum sentence affects the guideline range. §5G1.1. In a drug case, consider whether the defendant qualifies for relief from a statutory minimum under the “safety valve” guideline, §5C1.2.

- Consider any possible grounds for departure, upward or downward. Take note of any specific suggestions for departure contained in commentary to the offense conduct guidelines in Chapter Two. Review the total criminal history—not just countable convictions—for possible departure in light of policy statement §4A1.3, Adequacy of Criminal History Category. Study the Commission’s policy statements in the introduction, Chapter 1, Part A(4)(b), p.s.; in Chapter Five, Part H (Specific Offender Characteristics); and in Chapter Five, Part K (Departures). Keep in mind, however, that grounds for departure are not limited to those discussed by the Commission, and that factors not justifying departure individually may combine to support a departure in a particular case. *See* §5K2.0, p.s.,

comment. para. 2. A major part of sentencing advocacy on behalf of the defendant is resisting an upward departure and seeking a downward departure.

Sentencing Hearing. Preparing for the sentencing hearing requires familiarity with the procedures for disclosing the presentence report and objecting to it, and for resolving disputes both before and during the hearing. These procedures are set out in Federal Rule of Criminal Procedure 32 and Chapter Six, Part A of the *Guidelines Manual*, and they may also be governed by local court rules or practices. At the sentencing hearing, counsel must scrupulously observe traditional rules on preservation of error to protect issues for possible appeal under 18 U.S.C. § 3742.

Plea Bargaining Under the Guidelines

Federal Rule of Criminal Procedure 11(c)(1) and policy statement §6B1.2⁹ describe three forms of plea agreement: charge bargain, sentence recommendation, and specific, agreed sentence. While other forms of plea agreement are possible, these are the most common, and each has important consequences under guideline sentencing. A charge bargain must be carefully analyzed to determine whether its supposed benefit is real or illusory, once the effect of relevant conduct and multiple-count grouping have been considered. Other, equally important considerations affect the possible benefits of sentence-recommendation and sentence-agreement bargains. In all cases, the potential value of an acceptance-of-responsibility adjustment must be carefully considered. And because cooperation by the defendant is a common element of a plea bargain, the statutory and guideline provisions that affect cooperating defendants can be of paramount importance. Each of these subjects is discussed below.

Charge Bargaining. Policy statement §6B1.2(a) authorizes the court to accept a defendant's plea to one or more charges under Rule 11(c)(1)(A), in

exchange for the dismissal of others, if “the remaining charges adequately reflect the seriousness of the actual offense behavior” and “accepting the agreement will not undermine the statutory purposes of sentencing or the sentencing guidelines.” Federal plea bargaining has typically involved this form of agreement, under which a defendant has the right to withdraw his plea to the bargained charges if the other charges are not dismissed. Charge bargains, however, will often have little effect on the guideline range. This is because of the dramatic impact of two related guideline concepts: relevant conduct and multiple-count grouping.

Relevant conduct. The common plea agreement calling for dismissal of counts will not reduce the offense level if the subject matter of the dismissed counts is “relevant conduct” for purposes of determining the guideline range. See U.S.S.G. §1B1.3. For example, a defendant charged with multiple counts of distributing controlled substances who pleads guilty to only one count will usually have a base offense level determined from the total amount of drugs involved in all counts.

Despite the effect of the relevant conduct guideline, charge bargaining remains important in the sentencing context. When one of the counts is governed by a Chapter Two guideline with a lower offense level, a plea to that count may produce a lower guideline range.¹⁰ Even if a count does not have a lower guideline range, it may carry a lower statutory maximum. Because statutes “trump” guidelines, a given count may cap the maximum sentence below the probable guideline range for the case. This is not a departure; when the statutory maximum sentence is less than the minimum of the applicable guideline range, the statutory maximum becomes the guideline sentence. §5G1.1(a). Similarly, a charge bargain may avoid a statutory minimum that would raise a sentence above the otherwise-applicable guideline range. See §5G1.1(b) (statutory minimum becomes the guideline sentence if it is above the maximum of the otherwise applicable guideline range). Even when the estimated guideline range falls within the statutory sentencing range, a charge bargain to a count with a lower statutory maximum can limit the extent of an upward departure.

9. Policy statement §6B1.2 and other provisions of the 2002 *Guidelines Manual* refer to the Federal Rules of Criminal Procedure as they were numbered before their amendment effective December 1, 2002. At that time, the provisions of Rule 11(c) were found in subdivision (e).

10. However, dismissed charges not considered in determining the guideline range can provide grounds for upward departure. §5K2.21, p.s.

Multiple-count grouping. A corollary to the relevant-conduct rule, guideline §3D1.2 requires grouping of counts in many common prosecutions in which separate charges involve substantially the same harm. When counts are grouped, a single offense level—the highest of the counts in the group—applies to those counts of conviction. §3D1.3(a). In such cases, the offense level will not be adjusted upward even if a defendant is convicted of multiple counts. However, in the case of offenses that the guidelines do not group—such as robberies—Chapter 3, Part D may require an upward adjustment for multiple convictions. Dismissing counts will avoid this adjustment, provided the defendant does not stipulate to all the elements of the dismissed offenses as part of a plea bargain. Even in a single-count prosecution, a plea bargain can invoke a multiple-count adjustment by specifically stipulating to the commission of an additional offense. *See* §1B1.2(c). Regardless of the grouping rules, some statutes—most notably 18 U.S.C. § 924(c)—require a consecutive sentence.

Sentencing Recommendation; Specific Sentencing Agreement. In addition to charge bargains, Rule 11 authorizes the prosecutor to make nonbinding recommendations, and binding agreements, with regard to the sentence to be imposed. Rule 11(c)(1)(B) authorizes the prosecutor to recommend, or agree not to oppose, a particular sentence or sentencing range, or the application of a particular guideline or policy statement. A court may accept such a recommendation only if the proposed sentence is within the applicable guideline range or departs from the range for justifiable reasons. U.S.S.G. §6B1.2(b), p.s. Sentence recommendations under Rule 11(c)(1)(B) are non-binding: A defendant who agrees to such a recommendation must understand that if the court rejects it, he is not entitled to withdraw the plea. FED. R. CRIM. P. 11(c)(3)(B).

Rule 11(c)(1)(C) authorizes a plea agreement that requires imposition of a specific sentence, a sentence within an agreed guideline range, or the application of a particular guideline or policy statement. As with sentence recommendations, these agreements may be approved if the agreed sentence is within the calculated guideline range or is a justified departure. U.S.S.G. §6B1.2(c), p.s. But unlike sentence-recommendation agreements, Rule 11(c)(1)(C) agreements are binding: If the court

rejects the proposed sentence, the defendant is entitled to withdraw the plea.

Because a Rule 11(c)(1)(C) sentence bargain severely limits sentencing discretion, counsel seeking one may encounter resistance from, or categorical rejection by, the prosecutor or the judge. If an agreement to a specific sentence cannot be obtained, or if court rejection is anticipated, counsel should consider the less-restrictive forms authorized by the rule, which can still afford the defendant a measure of protection. For example, the parties might agree under Rule 11(c)(1)(C) that a sentence not exceed a certain guideline range, that a particular adjustment apply, or that the court not depart. If the court does not follow the parties' agreement on a particular sentence component, the defendant can withdraw the plea.

Acceptance of Responsibility. Sometimes, the only perceived guideline-range benefit for a plea of guilty may be the adjustment for acceptance of responsibility. Pleading guilty does not ensure the adjustment, but it provides a basis for it. Demanding trial does not automatically preclude the adjustment, but usually renders it a remote possibility. The court's determination of acceptance of responsibility "is entitled to great deference on review." U.S.S.G. §3E1.1, comment. (n.5). Commentary explains that the adjustment for acceptance of responsibility is to be determined by reference to the offense of conviction; the defendant need not admit relevant conduct.¹¹ Nevertheless, while "[a] defendant may remain silent" about relevant conduct, "a defendant who falsely denies, or frivolously contests, relevant conduct that the court determines to be true has acted in a manner inconsistent with acceptance of responsibility." *Id.* (n.1(a)).

In evaluating the prospects for an acceptance-of-responsibility adjustment, counsel must guard against giving up a valuable right to trial, solely in pursuit of an adjustment that may already be lost. Scrutinize all pertinent facts that may bear upon this determination, paying special attention to the

11. In contrast, the "safety valve" specifically requires that, before a defendant can be sentenced below a statutory minimum, he must provide the government with all information and evidence concerning not only the offense, but also "offenses that were part of the same course of conduct or of a common scheme or plan." 18 U.S.C. § 3553(f)(5); *see also* U.S.S.G. §5C1.2(5) (same).

possibility of an adjustment for obstruction of justice under guideline §3C1.1. *See* U.S.S.G. §3E1.1, comment. (n.4). When it is certain that a defendant will not receive the adjustment for acceptance of responsibility even upon a plea of guilty, and the plea confers no other benefit, then the plea will not improve the guideline range. Even so, a guilty plea may benefit the defendant—by diminishing the risk of an upward departure, improving the possibility or extent of a downward departure, or inducing the court to impose a lower sentence within the range.

Cooperation. Congress directed the Commission to ensure that the guidelines reflect the general appropriateness of imposing a lower sentence “to take into account a defendant’s substantial assistance in the investigation or prosecution of another person who has committed an offense.” 28 U.S.C. § 994(n). The Commission responded to this directive by promulgating policy statement §5K1.1. The policy statement requires a motion by the government before the court can depart for substantial assistance. While §5K1.1 is a policy statement, not a guideline, the government’s motion is “the condition limiting the court’s authority” to reduce sentence. *Wade v. United States*, 504 U.S. 181, 185 (1992) (dictum). A departure below a statutory minimum on the basis of substantial assistance similarly requires a motion by the government. 18 U.S.C. § 3553(e). While “[s]ubstantial weight should be given to the government’s evaluation of the extent of the defendant’s assistance,” the significance and usefulness of the defendant’s assistance is ultimately a determination for the court. §5K1.1(a)(1), p.s. & comment. (n.3). Absent a government motion for downward departure, the court can still consider cooperation in placing the sentence within the guideline range or determining the extent of a departure based on other grounds. By contrast, “[a] defendant’s refusal to assist authorities . . . may not be considered as an aggravating sentencing factor.” §5K1.2, p.s.

A defendant contemplating cooperation should always seek the protection of Federal Rule of Evidence 410 and guideline §1B1.8. With limited exceptions, Rule 410 renders inadmissible, in any civil or criminal proceeding, any statement made in the course of plea discussions with an attorney for the government, even if the discussions do not

ultimately result in a guilty plea.¹² *See also* FED. R. CRIM. P. 11(f).

Guideline §1B1.8 permits the parties to agree that self-incriminating information provided by a cooperating defendant will not be used to determine the applicable guideline range. Guideline §1B1.8 has limited effect: Self-incriminating information can still be used if it was previously known to the government; if it relates to criminal history; if the defendant is prosecuted for perjury or false statement; or if the defendant breaches the cooperation agreement. Moreover, §1B1.8 protects the defendant only in determining the guideline range, not from fixing the sentence higher within the range or departing upward. While it is the “policy of the Commission” that information “shall not be used” for an upward departure, §1B1.8, comment. (n.1), counsel should seek an agreement that expressly precludes using the information as a basis for any increase in sentence.

Some Traps for the Unwary

Pretrial Services Interview. In most courts, a pretrial services officer (or probation officer designated to perform pretrial services) will seek to interview arrested persons before their initial appearance, to gather information pertinent to the release decision. The information will be made available to the court, the prosecutor, and defense counsel, and later to the probation officer preparing any presentence report. 18 U.S.C. § 3153(c)(1), (c)(2)(C). Absent specified exceptions, however, information obtained during pretrial services functions “is not admissible on the issue of guilt in a criminal judicial proceeding.” § 3153(c)(3). Certain information pertinent to the release decision—including criminal history (especially juvenile adjudications and tribal court convictions that might otherwise be unavailable), earnings history, and possession of a special skill—can raise the guideline range for imprisonment and fine, or provide a basis for upward departure. Whenever possible, counsel should advise the defendant of these considerations before the interview, with scrupulous care that any information provided be truthful. A finding that the defendant provided false information can lead to

12. The Supreme Court has held that a defendant may waive the protections of Rule 410 as part of a plea agreement. *United States v. Mezzanatto*, 513 U.S. 196 (1995).

denial of acceptance of responsibility, an upward adjustment for obstruction, or the filing of additional charges. Because of these dangers, counsel who enters a case after the report is prepared must learn what information was acquired by the officer to be aware of its possible effect on the sentence.

Waiver of Sentencing Appeal. One of the most important safeguards put in place by the Sentencing Reform Act was the right of appellate review of guideline sentences and departures. See 18 U.S.C. § 3742. Recent Sentencing Commission statistics indicate that nearly 1 out of 7 sentencing appeals results in complete or partial reversal.

In many districts, prosecutors attempt to insulate sentences from review under § 3742 by requiring the defendant to waive the right to appeal the sentence as part of a plea agreement. The Supreme Court has never sanctioned these appeal waivers, and a number of district judges have refused to accept them as part of plea bargains.¹³ However, they have been approved by every court of appeals that has considered them (with some limitations).¹⁴

13. See, e.g., *United States v. Johnson*, 992 F. Supp. 437 (D.D.C. 1997) (refusing to accept plea bargain containing appeal waiver provision); *United States v. Raynor*, 989 F. Supp. 43 (D.D.C. 1997) (same); see also *United States v. Melancon*, 972 F.2d 566, 570–80 (5th Cir. 1992) (Parker, J., concurring) (expressing serious misgivings about legality and wisdom of appeal waivers).

14. See, e.g., *United States v. Khattak*, 273 F.3d 557, 563 (3d Cir. 2001) (appeal waiver not binding when sentencing error would work a miscarriage of justice); *United States v. Teeter*, 257 F.3d 14, 25–26 (1st Cir. 2001) (same); *United States v. Brown*, 232 F.3d 399, 403 (4th Cir. 2000) (appeal waiver does not bar appeal if sentence exceeded maximum authorized penalty or was based on constitutionally impermissible factor); *United States v. Black*, 201 F.3d 1296, 1301 (10th Cir. 2000) (appeal waivers, like other contracts, subject to public policy constraints); *United States v. Goodman*, 165 F.3d 169, 175 (2d Cir. 1999) (refusing to enforce a broad waiver that would expose the defendant to “a virtually unbounded risk of error or abuse by the sentencing court”); *United States v. Jacobson*, 15 F.3d 19, 23 (2d Cir. 1994) (waiver not binding if sentence imposed on basis of ethnic bias); *United States v. Marin*, 961 F.2d 493, 496 (4th Cir. 1992) (waiver cannot subject defendant to sentencing at whim of district court); *United States v. Navarro-Botello*, 912 F.2d 318, 321 (9th Cir. 1990) (waiver does not prevent appeal if sentence imposed is not in accordance with negotiated agreement).

Federal Rule of Criminal Procedure 11(b)(1)(N) requires that the district court advise the defendant of the terms of any bargained sentencing appeal waiver as part of the plea colloquy.

Unthinking acceptance of an appeal waiver can have disastrous results for the client. The waiver is usually accepted before the presentence report is prepared; at that time, the defendant cannot know what possible errors the probation officer, or the court, will make in determining the guideline range or the propriety of a departure. Counsel can defend against this danger by refusing to agree to a waiver, or by demanding concessions in exchange for it (e.g., that the prosecutor agree to a binding sentence or guideline range, or a requirement that the court not depart). If the prosecutor insists on the waiver, and refuses to give valuable concessions in exchange for it, defense counsel should carefully consider with the defendant whether to plead without an agreement, or go to trial. Counsel should also resist any proposed waiver that does not except appeals or collateral attacks based on ineffective assistance or prosecutorial misconduct; without these exceptions, the waiver presents the serious ethical problem of lawyers bargaining to protect themselves from possible future liability.¹⁵

Presentence Investigation Report and Probation Officer’s Interview. In most cases, a probation officer will provide a presentence investigation report to the court before imposition of sentence. 18 U.S.C. § 3552(a); FED. R. CRIM. P. 32(c). The importance of the report cannot be overstated. In it, the probation officer will recommend fact findings, guideline calculations, and potential grounds for departure. Many of these recommendations, while nominally objective, have significant subjective components. The officer’s attitude toward the case or the client may substantially influence the sentence recommendations, which enjoy considerable deference from both the judge at sentencing and the reviewing court on appeal. For these reasons, the effective advocate will independently review all elements of the probation officer’s report to make any necessary objections and affirmatively present the defense case for a favorable sentence. Defense counsel should never assume that the probation

15. See Ohio Advisory Ethics Op. 2001-6 (2001); Tennessee Advisory Ethics Op. 94-A-549 (1994); North Carolina Ethics Op. 129 (1993).

officer has arrived at a favorable recommendation, or even a correct one.

The probation officer's presentence investigation will usually include an interview of the defendant. Broader than the interview conducted by pretrial services, this interview has even greater potential to aggravate a sentence in specific, foreseeable ways. Disclosing undetected relevant conduct may, by operation of guideline §1B1.3, increase the offense level. Information first revealed during the presentence interview may affect Chapter Three adjustments, such as obstruction of justice and acceptance of responsibility. Undiscovered criminal history may increase the criminal history score or provide a ground for departure. Conduct not otherwise apparent, such as drug use and criminal associations, may likewise result in an upward adjustment or departure, or support a higher sentence within the guideline range.

Because the presentence interview holds many perils, the defendant must fully understand its function and importance, and defense counsel should attend the interview. In some cases, counsel may decide to limit the scope of the presentence interview. While the privilege against self-incrimination applies to sentencing issues, *Mitchell v. United States*, 526 U.S. 314 (1999), refusal to submit to an unrestricted presentence interview is often hazardous. It can jeopardize the adjustment for acceptance of responsibility or adversely affect other incidents of the sentence, including the placement of the sentence within the guideline range. There is no fixed solution to this dilemma; counsel must make an informed decision as to the best course in the context of the particular case.

Guideline Amendments. Title 28 U.S.C. § 994(p) authorizes the Commission to submit guideline amendments to Congress by May 1 of each year; the amendments take effect November 1, absent congressional modification or disapproval. When directed by Congress, the Commission may also promulgate "emergency" amendments outside the regular amendment cycle. *See, e.g.*, 68 Fed. Reg. 3080 (January 22, 2003) (promulgating emergency guideline amendments regarding fraud and illegal campaign activities). Since the guidelines were first promulgated in 1987, they have been amended over 600 times. A single amendment may change many guideline provisions. All the amendments, along

with explanatory notes, are contained in Appendix C to the *Guidelines Manual*.¹⁶

Counsel should become familiar with each new round of submitted amendments as soon as they are published by the Commission. When a submitted amendment would lower a defendant's guideline range, it may support a request for downward departure even before its effective date.

Normally, the guidelines in effect on the date of sentencing apply. §1B1.11(a). The courts have taken the view, under the Ex Post Facto Clause, that a guideline amendment which takes effect between the commission of the offense and the date of sentencing cannot be applied to result in a higher sentencing range. *See United States v. Seacott*, 15 F.3d 1380, 1384 (7th Cir. 1994) (noting circuits' agreement on issue); *cf. Miller v. Florida*, 482 U.S. 423 (1987) (Clause bars retrospective application of harmful amendment to state sentencing guideline). If ex post facto principles require use of an earlier guideline, the Commission states that "[t]he Guidelines Manual in effect on a particular date shall be applied in its entirety." U.S.S.G. §1B1.11(b)(2).

Each guideline includes a historical note, which facilitates determining whether the guideline has been amended since the offense was committed. Particular attention must be paid to amendments that the Commission denominates "clarifying." Clarifying amendments are intended to explain the meaning of previously-promulgated guidelines, and the Ex Post Facto Clause may not bar their application to offenses committed before their effective date. If a proposed clarifying guideline amendment benefits the client, counsel should seek its application even before the effective date, arguing that it provides authoritative guidance as to the meaning of the current guideline. On the other hand, if a proposed amendment is harmful, counsel should not automatically accede to its retroactive application, simply because the Commission characterized it as "clarifying."

Some amendments may benefit a defendant who is already serving an imprisonment term. If the Commission expressly provides that a beneficial amendment has retroactive effect, and the amendment would reduce the defendant's guideline

16. The official *Guidelines Manual* divides Appendix C between the main volume and a supplement.

range, the court may reduce the sentence. 18 U.S.C. § 3582(c)(2); U.S.S.G. §1B1.10, p.s.

Validity of Guidelines. In keeping with express statutory language and with general principles of delegation, the Sentencing Commission's guidelines, policy statements, and commentary must be consistent with every pertinent provision of titles 18 and 28 of the United States Code. 28 U.S.C. § 994(a). They must also, of course, conform to the requirements of the Constitution. *See Mistretta v. United States*, 488 U.S. 361 (1989) (considering constitutional challenges to guideline sentencing); *cf. Apprendi v. New Jersey*, 530 U.S. 466, 543–45 (2000) (O'Connor, J., dissenting) (questioning the continuing validity of guideline enhancements in light of principle announced by majority); *id.* at 523 n.11 (Thomas, J., concurring) (same). Counsel must scrutinize all pertinent provisions for both statutory and constitutional validity, with special attention to recent amendments. *See, e.g., United States v. LaBonte*, 520 U.S. 751 (1997) (invalidating guideline amendment as contrary to congressional directive in 28 U.S.C. § 994).

Telephone Support and Online Information

The Defender Services Division Training Branch, Administrative Office of the U.S. Courts, provides a toll-free hotline for federal defender organizations and private attorneys providing defense services under the Criminal Justice Act. The number is 800-788-9908. The Sentencing Commission also offers telephone support on the guidelines, at 202-502-4545.

Information on guideline sentencing is also available on the Internet. Some of the most useful sites follow.

- The U.S. Sentencing Commission Website, which contains a wealth of well-organized material, <http://www.ussc.gov>.
- The Federal Judicial Center Website, which includes a variety of sentencing information, including the *Guideline Sentencing Update* and *Guideline Sentencing: An Outline of Appellate Case Law on Selected Issues*, <http://www.fjc.gov>.
- The Families Against Mandatory Minimums Website, which includes a layperson's explanation of the interplay between the federal sentencing

guidelines and statutory minimum sentences, <http://www.famm.org>.

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Manuals and Treatises

PHYLIS S. BAMBERGER & DAVID J. GOTTLIEB, EDS. *Practice Under the Federal Sentencing Guidelines* (Aspen Publishers, Inc., 4th ed. 2001). An explication of the guidelines and strategies from

both the prosecution and the defense perspective; includes historical and background material.

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ROGER W. HAINES JR. ET AL., *Federal Sentencing Guidelines Handbook* (West Group 2002). An annotated version of the *Guidelines Manual*, with authors' notes and extensive case citations.

THOMAS W. HUTCHISON ET AL., *Federal Sentencing Law and Practice* (West Group 2002). A guidelines manual with extensive annotations and additional materials.

Periodicals

FEDERAL JUDICIAL CENTER, *Guideline Sentencing Update*. A periodical distributed within the judicial branch; may be available in your court library. Also available from the Publications section (Sentencing) of the Center's Website at <http://www.fjc.gov>.

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About This Publication

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Worksheet A (Offense Level)

Defendant _____ District/Office _____

Docket Number (Year-Sequence-Defendant No.) _____ - _____ - _____ - _____ - _____

Count Number(s) _____ U.S. Code Title & Section _____ : _____
_____ : _____

Guidelines Manual Edition Used: 20____ (NOTE: worksheets keyed to the Manual effective November 1, 2001)

Instructions:

For each count of conviction (or stipulated offense), complete a separate Worksheet A. Exception: Use only a single Worksheet A where the offense level for a group of closely related counts is based primarily on aggregate value or quantity (see §3D1.2(d)) or where a count of conspiracy, solicitation, or attempt is grouped with a substantive count that was the sole object of the conspiracy, solicitation, or attempt (see §3D1.2(a) and (b)).

1. Offense Level (See Chapter Two)

Enter the applicable base offense level and any specific offense characteristics from Chapter Two and explain the bases for these determinations. Enter the sum in the box provided.

<u>Guideline</u>	<u>Description</u>	<u>Level</u>
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____

Sum

2. Victim-Related Adjustments (See Chapter Three, Part A)

Enter the applicable section and adjustment. If more than one section is applicable, list each section and enter the combined adjustment. If no adjustment is applicable, enter "0."

§ _____

3. Role in the Offense Adjustments (See Chapter Three, Part B)

Enter the applicable section and adjustment. If more than one section is applicable, list each section and enter the combined adjustment. If the adjustment reduces the offense level, enter a minus (-) sign in front of the adjustment. If no adjustment is applicable, enter "0."

§ _____

4. Obstruction Adjustments (See Chapter Three, Part C)

Enter the applicable section and adjustment. If more than one section is applicable, list each section and enter the combined adjustment. If no adjustment is applicable, enter "0."

§ _____

5. Adjusted Offense Level

Enter the sum of Items 1-4. If this worksheet does not cover all counts of conviction or stipulated offenses, complete Worksheet B. Otherwise, enter this result on Worksheet D, Item 1.

☐

Check if the defendant is convicted of a single count. In such case, Worksheet B need not be completed.

☐

If the defendant has no criminal history, enter criminal history "I" here and on Item 4, Worksheet D. In such case, Worksheet C need not be completed.

Worksheet B

(Multiple Counts or Stipulation to Additional Offenses)

Defendant _____

Docket Number _____

Instructions

Step 1: Determine if any of the counts group. (Note: All, some, or none of the counts may group. Some of the counts may have already been grouped in the application under Worksheet A, specifically, (1) counts grouped under §3D1.2(d), or (2) a count charging conspiracy, solicitation, or attempt that is grouped with the substantive count of confiction (see §3D1.2(a)). Explain the reasons for grouping:

Step 2: Using the box(es) provided below, for each group of closely related counts, enter the highest adjusted offense level from the various "A" Worksheets (Item 5) that comprise the group (see §3D1.3). (Note: A "group" may consist of a single count that has not grouped with any other count. In those instances, the offense level for the group will be the adjusted offense level for the single count.)

Step 3: Enter the number of units to be assigned to each group (see §3D1.4) as follows:

- One unit (1) for the group of closely related counts with the highest offense level
- An additional unit (1) for each group that is equally serious or 1 to 4 levels less serious
- An additional half unit (1/2) for each group that is 5 to 8 levels less serious
- No increase in units for groups that are 9 or more levels less serious

1. **Adjusted Offense Level for the First Group of Closely Related Counts**

Count number(s): _____

_____ (unit)

2. **Adjusted Offense Level for the Second Group of Closely Related Counts**

Count number(s): _____

_____ (unit)

3. **Adjusted Offense Level for the Third Group of Closely Related Counts**

Count number(s): _____

_____ (unit)

4. **Adjusted Offense Level for the Fourth Group of Closely Related Counts**

Count number(s): _____

_____ (unit)

5. **Adjusted Offense Level for the Fifth Group of Closely Related Counts**

Count number(s): _____

_____ (unit)

6. **Total Units**

(total units)

7. **Increase in Offense Level Based on Total Units (See §3D1.4)**

1 unit:	no increase	2 1/2 - 3 units:	add 3 levels
1 1/2 units:	add 1 level	3 1/2 - 5 units:	add 4 levels
2 units:	add 2 levels	More than 5 units:	add 5 levels

8. **Highest of the Adjusted Offense Levels from Items 1-5 Above**

9. **Combined Adjusted Offense Level (See §3D1.4)**

Enter the sum of Items 7 and 8 here and on Worksheet D, Item 1.

Worksheet C (Criminal History)

Defendant _____

Docket Number _____

Enter the Date Defendant Commenced Participation in Instant Offense (Earliest Date of Relevant Conduct) _____

1. 3 Points for each prior ADULT sentence of imprisonment EXCEEDING ONE YEAR AND ONE MONTH imposed within 15 YEARS of the defendant's commencement of the instant offense OR resulting in incarceration during any part of that 15-YEAR period. (See §§4A1.1(a) and 4A1.2.)
2. 2 Points for each prior sentence of imprisonment of AT LEAST 60 DAYS resulting from an offense committed ON OR AFTER the defendant's 18th birthday not counted under §4A1.1(a) imposed within 10 YEARS of the instant offense; and

2 Points for each prior sentence of imprisonment of AT LEAST 60 DAYS resulting from an offense committed BEFORE the defendant's 18th birthday not counted under §4A1.1(a) from which the defendant was released from confinement within 5 YEARS of the instant offense. (See §§4A1.1(b) and 4A1.2.)
3. 1 Point for each prior sentence resulting from an offense committed ON OR AFTER the defendant's 18th birthday not counted under §4A1.1(a) or §4A1.1(b) imposed within 10 YEARS of the instant offense; and

1 Point for each prior sentence resulting from an offense committed BEFORE the defendant's 18th birthday not counted under §4A1.1(a) or §4A1.1(b) imposed within 5 YEARS of the instant offense. (See §§4A1.1(c) and 4A1.2.)

NOTE: A maximum sum of 4 Points may be given for the prior sentences in Item 3.

Date of Imposition	Offense	Sentence	Release Date**	Guideline Section	Criminal History Pts.
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____

* Indicate with an asterisk those offenses where defendant was sentenced as a juvenile.

** A release date is required in only three instances:

- a. When a sentence covered under §4A1.1(a) was imposed more than 15 years prior to the commencement of the instant offense but release from incarceration occurred within such 15-year period;
- b. When a sentence counted under §4A1.1(b) was imposed for an offense committed prior to age 18 and more than 5 years prior to the commencement of the instant offense, but release from incarceration occurred within such 5-year period; and
- c. When §4A1.1(e) applies because the defendant was released from custody on a sentence counted under 4A1.1(a) or 4A1.1 (b) within 2 years of the instant offense or was still in custody on such a sentence at the time of the instant offense (see Item 6).

4. Sum of Criminal History Points for prior sentences under §§4A1.1(a), 4A1.1(b), and 4A1.1(c) (Items 1,2,3).

Worksheet C

Defendant _____

Docket Number _____

5. 2 Points if the defendant committed the instant offense while under any criminal justice sentence (e.g., probation, parole, supervised release, imprisonment, work release, escape status). (See §§4A1.1(d) and 4A1.2.) List the type of control and identify the sentence from which control resulted. Otherwise, enter 0 Points.

6. 2 Points if the defendant committed the instant offense LESS THAN 2 YEARS after release from imprisonment on a sentence counted under §4A1.1(a) or (b), or while in imprisonment or escape status on such a sentence. However, enter only 1 Point for this item if 2 points were added at Item 5 under §4A1.1(d). (See §§4A1.1(e) and 4A1.2.) List the date of release and identify the sentence from which release resulted. Otherwise, enter 0 Points.

7. 1 Point for each prior sentence resulting from a conviction of a crime of violence that did not receive any points under §4A1.1(a), (b), or (c) because such sentence was considered related to another sentence resulting from a conviction of a crime of violence. *Provided*, that this item does not apply where the sentences are considered related because the offenses occurred on the same occasion. (See §§4A1.1(f) and 4A1.2.) Identify the crimes of violence and briefly explain why the cases are considered related. Otherwise, enter 0 Points.

Note: A maximum sum of 3 Points may be given for Item 7.

8. **Total Criminal History Points** (Sum of Items 4-7)

9. **Criminal History Category** (Enter here and on Worksheet D, Item 4)

<u>Total Points</u>	<u>Criminal History Category</u>
0-1	I
2-3	II
4-6	III
7-9	IV
10-12	V
13 or more	VI

Worksheet D (Guideline Worksheet)

Defendant _____

District _____

Docket Number _____

1. **Adjusted Offense Level** (From Worksheet A or B)

If Worksheet B is required, enter the result from Worksheet B, Item 9.

Otherwise, enter the result from Worksheet A, Item 5.

2. **Acceptance of Responsibility** (See Chapter Three, Part E)

Enter the applicable reduction of 2 or 3 levels. If no adjustment is applicable, enter "0".

3. **Offense Level Total** (Item 1 less Item 2)

4. **Criminal History Category** (From Worksheet C)

Enter the result from Worksheet C, Item 9.

5. **Terrorism/Career Offender/Criminal Livelihood/Armed Career Criminal/Repeat and Dangerous Sex Offender** (see Chapter Three, Part A, and Chapter Four, Part B)

a. Offense Level Total

If the provision for Career Offender (§4B1.1), Criminal Livelihood (§4B1.3), Armed Career Criminal (§4B1.4), or Repeat and Dangerous Sex Offender (§4B1.5) results in an offense level total higher than Item 3, enter the offense level total. Otherwise, enter "N/A."

b. Criminal History Category

If the provision for Terrorism (§3A1.4), Career Offender (§4B1.1), Armed Career Criminal (§4B1.4), or Repeat and Dangerous Sex Offender (§4B1.5) results in a criminal history category higher than Item 4, enter the applicable criminal history category. Otherwise, enter "N/A."

6. **Guideline Range from Sentencing Table**

Enter the applicable guideline range from Chapter Five, Part A.

Months

7. **Restricted Guideline Range** (See Chapter Five, Part G)

If the statutorily authorized maximum sentence or the statutorily required minimum sentence restricts the guideline range (Item 6) (see §§5G1.1 and 5G1.2), enter either the restricted guideline range or any statutory maximum or minimum penalty that would modify the guideline range. Otherwise, enter "N/A."

Months

☐

Check this box if §5C1.2 (Limitation on Applicability of Statutory Minimum Penalties in Certain Cases) is applicable.

8. **Undischarged Term of Imprisonment** (See §5G1.3)

☐

If the defendant is subject to an undischarged term of imprisonment, check this box and list the undischarged term(s) below.

Defendant _____

Docket Number _____

9. **Sentencing Options** (Check the applicable box that corresponds to the Guideline Range entered in Item 6.)
(See Chapter Five, Sentencing Table)

☐

Zone A If checked, the following options are available (see §5B1.1):

- Fine (See §5E1.2(a))
- "Straight" Probation
- Imprisonment

☐

Zone B If checked, the minimum term may be satisfied by:

- Imprisonment
- Imprisonment of at least one month plus supervised release with a condition that substitutes community confinement or home detention for imprisonment (see §5C1.1(c)(2))
- Probation with a condition that substitutes intermittent confinement, community confinement, or home detention for imprisonment (see §5B1.1(a)(2) and §5C1.1(c)(3))

☐

Zone C If checked, the minimum term may be satisfied by:

- Imprisonment
- Imprisonment of at least one-half of the minimum term plus supervised release with a condition that substitutes community confinement or home detention for imprisonment (see §5C1.1(d)(2))

☐

Zone D If checked, the minimum term shall be satisfied by a sentence of imprisonment (see §5C1.1(f))

10. **Length of a Term of Probation** (See §5B1.2)

If probation is authorized, the guideline for the length of such term of probation is: (Check applicable box)

☐

At least one year, but not more than five years if the offense level total is 6 or more

☐

No more than three years if the offense level total is 5 or less

11. **Conditions of Probation** (See §5B1.3)

List any mandatory conditions ((a)(1)-(9)), standard conditions ((c)(1)-(14)), and any other special conditions that may be applicable:

Defendant _____

Docket Number _____

12. Supervised Release (See §§5D1.1 and 5D1.2)

a. A term of supervised release is: (Check applicable box)

- ☐ Required because a term of imprisonment of more than one year is to be imposed or if required by statute
- ☐ Authorized but not required because a term of imprisonment of one year or less is to be imposed

b. Length of Term (Guideline Range of Supervised Release) (Check applicable box)

- ☐ Class A or B Felony: Three to Five Year Term
- ☐ Class C or D Felony: Two to Three Year Term
- ☐ Class E Felony or Class A Misdemeanor: One Year Term

c. Restricted Guideline Range of Supervision Release

- ☐ If a statutorily required term of supervised release impacts the guideline range, check this box and enter the required term. _____

13. Conditions of Supervised Release (See §5D1.3)

List any mandatory conditions ((a)(1)-(7)), standard conditions ((c)(1)-(15)), and any other special conditions that may be applicable:

14. Restitution (See §5E1.1)

- a. If restitution is applicable, enter the amount. Otherwise enter "N/A" and the reason: _____
- b. Enter whether restitution is statutorily mandatory or discretionary: _____
- c. Enter whether restitution is by an order of restitution or solely as a condition of supervision. Enter the authorizing statute: _____

15. Fines (Guideline Range of Fines for Individual Defendants) (See §5E1.2)

- | a. Special fine provisions | <u>Minimum</u> | <u>Maximum</u> |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------|----------------|
| <input type="checkbox"/> Check box if any of the counts of conviction is for a statute with a special fine provision. (This does not include the general fine provisions of 18 USC § 3571(b)(2), (d)) | | |
| Enter the sum of statutory maximum fines for all such counts | | \$ _____ |
| b. Fine Table (§5E1.2(c)(3)) | | |
| Enter the minimum and maximum fines | \$ _____ | \$ _____ |
| c. Guideline Range of Fines:
(determined by the minimum of the fine table (Item 15(b))
and the greater maximum above (Item 15(a) or 15(b))) | \$ _____ | \$ _____ |
| d. Ability to Pay | | |
| <input type="checkbox"/> Check this box if the defendant does not have an ability to pay. | | |

Worksheet D

Defendant _____

Docket Number _____

16. Special Assessments (See §5E1.3)

Enter the total amount of special assessments required for all counts of conviction:

- \$25 for each misdemeanor count of conviction
- Not less than \$100 for each felony count of conviction

\$_____

17. Additional Factors

List any additional applicable guidelines, policy statements, and statutory provisions. Also list any applicable aggravating and mitigating factors that may warrant a sentence at a particular point either within or outside the applicable guideline range. Attach additional sheets as required.

This image shows a blank sheet of white paper with horizontal ruling lines. The lines are evenly spaced and run across the width of the page. There are no margins, text, or other markings on the paper.

Completed by _____

Date _____

SENTENCING TABLE

(in months of imprisonment)

	Offense Level	Criminal History Category (Criminal History Points)					
		I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
Zone A	1	0-6	0-6	0-6	0-6	0-6	0-6
	2	0-6	0-6	0-6	0-6	0-6	1-7
	3	0-6	0-6	0-6	0-6	2-8	3-9
	4	0-6	0-6	0-6	2-8	4-10	6-12
	5	0-6	0-6	1-7	4-10	6-12	9-15
	6	0-6	1-7	2-8	6-12	9-15	12-18
	7	0-6	2-8	4-10	8-14	12-18	15-21
	8	0-6	4-10	6-12	10-16	15-21	18-24
Zone B	9	4-10	6-12	8-14	12-18	18-24	21-27
	10	6-12	8-14	10-16	15-21	21-27	24-30
Zone C	11	8-14	10-16	12-18	18-24	24-30	27-33
	12	10-16	12-18	15-21	21-27	27-33	30-37
Zone D	13	12-18	15-21	18-24	24-30	30-37	33-41
	14	15-21	18-24	21-27	27-33	33-41	37-46
	15	18-24	21-27	24-30	30-37	37-46	41-51
	16	21-27	24-30	27-33	33-41	41-51	46-57
	17	24-30	27-33	30-37	37-46	46-57	51-63
	18	27-33	30-37	33-41	41-51	51-63	57-71
	19	30-37	33-41	37-46	46-57	57-71	63-78
	20	33-41	37-46	41-51	51-63	63-78	70-87
	21	37-46	41-51	46-57	57-71	70-87	77-96
	22	41-51	46-57	51-63	63-78	77-96	84-105
	23	46-57	51-63	57-71	70-87	84-105	92-115
	24	51-63	57-71	63-78	77-96	92-115	100-125
	25	57-71	63-78	70-87	84-105	100-125	110-137
	26	63-78	70-87	78-97	92-115	110-137	120-150
	27	70-87	78-97	87-108	100-125	120-150	130-162
	28	78-97	87-108	97-121	110-137	130-162	140-175
	29	87-108	97-121	108-135	121-151	140-175	151-188
	30	97-121	108-135	121-151	135-168	151-188	168-210
	31	108-135	121-151	135-168	151-188	168-210	188-235
	32	121-151	135-168	151-188	168-210	188-235	210-262
	33	135-168	151-188	168-210	188-235	210-262	235-293
	34	151-188	168-210	188-235	210-262	235-293	262-327
	35	168-210	188-235	210-262	235-293	262-327	292-365
	36	188-235	210-262	235-293	262-327	292-365	324-405
	37	210-262	235-293	262-327	292-365	324-405	360-life
	38	235-293	262-327	292-365	324-405	360-life	360-life
	39	262-327	292-365	324-405	360-life	360-life	360-life
	40	292-365	324-405	360-life	360-life	360-life	360-life
	41	324-405	360-life	360-life	360-life	360-life	360-life
	42	360-life	360-life	360-life	360-life	360-life	360-life
	43	life	life	life	life	life	life